83 - 1821

in the Supreme Court of the United States

OCTOBER TERM,1984

NO. A-501

FRANCES LEVENSON
Appellant-Petitioner,

vs.

MARGARET M. HECKLER
Secretary of Health
and Human Services
Apellee-Respondent.

PETITION FOR WRIT OF CERTIORARI

FRANCES LEVENSON, PRO SE
Petitioner
P. O. Box 12405
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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review and which are submitted as being of national significance and concern are the following:

(a) Does the Social Security Administration have a duty to disclose to claimants their rights of entitlement to specific benefits based upon a thorough inquiry of potentially applicable facts which would warrant and disclose such specific entitlement?

(b) Herein, does the record reflect that the Social Security Administration failed in its duty aforementioned because there is substantial evidence supporting Petitioner's entitlement to widow's benefits?

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JURISDICTIONAL STATEMENT

COMES NOW the Petitioner, FRANCES LEVENSON, pro se, and brings this her writ of petition for certiorari originating with her claim for Social Security benefits from the Social Security Administration; from a timely complaint to the United States District Court for the Western District of Texas, San Antonio Division, and subsequent Appeal to the Fifth Circuit Court of Appeals, New Orleans, Louisiana, from an Order affirming the District Court's granting of Defendant's Motion for Summary Judgment, and therefore, as grounds for said Petition for Writ of Certiorari states the following in accordance with the Rules of this Honorable Court.

OPINIONS BELOW

The Appendices A-F contain the

prior Administrative findings, orders, opinions and judgments of the courts and agency below.

JURISDICTION

Jurisdiction of this Honorable Court is invoked by the Petitioner, hereby showing that an opinion was rendered by the Fifth Circuit Court of Appeals affirming the District Court's granting of Defendant's Motion for Summary Judgment. The Petition for Rehearing, timely filed, was denied and Order subsequently entered by the Fifth Circuit Court of Appeals.

Your Petitioner submits that jurisdiction in this Honorable Court should be granted on the basis that an important question of Federal Administrative law of national significance and concern, should be ruled upon by this Honorable Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent code of Federal regulations and applicable law is cited in the body of the statement of the case/argument, supra.

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THIS IS STRICTLY A CASE OF SUBSTANCE - NOT FORM
I AM NOT A LICENSED ATTORNEY

May I preface the following by expressing my gratitude for the extensions of time granted to me by this Honorable Court - because of my two surgeries.

THIS IS DEFINITELY NOT A "FRIVOLOUS CASE" IT INVOLVES MY CREDIBILITY, FAILURE OF DEFENDANT TO CAREFULLY READ MY PETITIONS. THE DECISION MAKERS RELIED SOLELY ON DEFENDANT'S PETITIONS AND ERRORS MADE BY THE LOCAL SSA OFFICE, AND THE LACK OF SPECIFICITY IN THE ALJ'S DECISION. IT INVOLVES FAIRNESS, AND ESPECIALLY MISPLACED LOYALTIES....ALL BECAUSE I AM PRO SE.

My claim is based upon my Request for Retroactive Widow's Benefits from the Social Security Administration, dating back to February 24, 1974 when I made Application for "Lump-Sum" Death Payment". I just cannot believe that this occurred TEN YEARS AGO - when it should have been resolved within no less than two months. Since I am Pro Se, it has been one grueling experience for me. (For the sake of brevity I will abbreviate the title of the Courts: ALJ, WDT, and 5th CCA, as well as SS and SSA. Emphasis marks are mine.)

I. FACTS AND TRUTH

My husband died December 15, 1973. My next birthdate was May 13, 1974, when I would become 60 - which was the required age to make an application.

A. IT IS SALIENT TO NOTE: that while we were

married in 1935, and divorced in 1959 - making a total of 24 years of marriage... MORE than the required time for a previously divorced widow to make a request for insurance.

We remarried in 1966, and divorced in 1971 - making a total of 5 more years of marriage.

We remarried December 1, 1973 while my husband was still in the hospital, and remained married until his death on December 15, 1973.

NEITHER REMARRIED ANYONE ELSE IN THE INTERVENING YEARS. I WAS EXECUTRIX AND BENEFICIARY OF HIS ESTATE.

I presented notarized copies of these documents to the SS, the ALJ, which were not tendered to him by the local SS office before the Hearing, WDT, and made referral to them to the 5TH CCA. The article that instigated my claim for RETROACTIVE benefits

said that one had to be married TEN YEARS BEFORE A DIVORCE TO BE ELEGIBLE TO MAKE CLAIM FOR WIDOW/WIDOWER'S BENEFITS. This information I furnished to the ALJ, WDT and the 5th CCA.

B. I HAD ABSOLUTELY NO PERSONAL PREKNOWLEDGE OF THE REQUIREMENT OF THE SSA. My mother died at age 65, and my Father elected to wait until he reached the 70's. I had no knowledge of whether he had applied for her benefits. Therefore, I did NOT know the questions...let alone the answers.

I DID NOT EVEN KNOW THAT I WAS TO COLLECT INSURANCE FROM THE SSA, until my brother-in-law informed me. He told me where the local office was located - to take my husband's SS card, and the Mortician's statement along with the Certificate of Death. He also told me that there would be a small remuneration for burial insurance. I called and made an appointment for February 24, 1974.

While I was in the process of making a decision whether to file suit with the WFD, after the ALJ'S Decision, I was given a pamphlet entitled "YOUR SOCIAL SECURITY". An excerpt from Page 8 - last paragraph reads:

"You can apply however, up to 3 months before the month you want benefits to start. This will help assure that you get your first payment on time." Therefore, I did make a TIMELY application...accidentally. This was documented with the WDT and the 5TH CCA.

IN THE CASE OF

UNITED STATES vs. NIXON,
PRESIDENT OF THE UNITED STATES, ET AL

73-1766 July, 1974 (AFFIRMED)

"Briefly, Chief Justice Burger's opinion indicated that because of their (Defendants') position, THEY ARE NOT ABOVE THE LAW.

Their positions DO NOT RELIEVE THEM OF THEIR RESPONSIBILITIES AND OBLIGATIONS TO FOLLOW THE RULES PRESCRIBED UNDER THE CONSTITUTION, as well as ANY OTHER Federal law.

Chief Justice Berger: in order to carry his burden, the Special Prosecutor must clear three hurdles: 1-2-3. SPECIFICITY."

According to the aforementioned case, would a reasonable mind not have reason to believe that any

person representing the SSA would be cognizant of all their own rules and regulations prescribed in the Manual - from the clerks, the supervisor, the ALJ, the Council of Appeals, and the two Higher Courts? Would a reasonable mind not expect the local staff to operate efficiently, speedily and with dexterity? AND ACCURACY?

Unfortunately, that was NOT to have been my experience with the personnel that I personally encountered at the local office.

MUST I BE PENALIZED because of other persons' omissions, misunderstandings, misinformation, misinterpretations, and taking my conversations out of context? MUST I BE PENALIZED because they violated their own Rules and Regulations, and I had no preknowledge of their doing so at the time.

THIS IS GROSSLY UNFAIR

C. IT IS IMPERATIVE TO NOTE: I HAD NO COPIES OF INSTRUMENTS DONE IN OTHER PERSONS' HANDWRITING. I HAD NO KNOWLEDGE THAT THEY DID N O T TRANSCRIBE MY ANSWERS CORRECTLY -

UNTIL WAY AFTER THE FACTS. This I reported to the ALJ, and time and again to the WDT and 5TH CCA.

There was only one exception: an instrument was mailed to me to fill in and return. I retained a copy. I also received a green sheet with instruction to report my earnings before April 1, 1980 - at the time I made application for my own benefits March 1, 1979. These instruments were not submitted by the local office to the ALJ before the Hearing. I submitted a copy of the green sheet to the WDT and 5TH CCA.

I assure you that IF I HAD HAD COPIES OF ALL MATERIAL THAT BORE MY signature (particularly of my original application, and the second one by Mrs. Yows) - I would not ever have had to contest anyone's errors IN A COURT.

At the time of the Hearing, I was only concerned with Mr. Whitt's interpolation of a statement that

I DID NOT MAKE: "I am not filing for widow's benefits at time as I am still working." - and Mrs. Yow's interpolation: "I am not applying for widow's benefits on my husband Meyer as my own benefit is much more." Both were taken OUT OF CONTEXT!.

Mrs. Tealer, the Supervisor, told me when I instigated my claim for Retroactive Benefits, all that I had to do was bring copies of my income tax statements "TO PROVE OUR RELATIONSHIP." THAT turned out to be INCORRECT, for some unexplained reason, because I did give her 5 years of income taxes that I secured from my accountant. She did not submit any of them to the ALJ BEFORE the Hearing.

I only learned of omissions when I went to the ALJ'S office to study the material, and to compare my files with theirs. They had failed to include much material that I had inspected in the file when it FINALLY ARRIVED from Kansas City. I brought the vital missing documents such as notarized marital

evidence, letters from the Payment Center, etc. to the Hearing.

ON PAGE 11 of His Decision, the ALJ admitted

"LIMITED DOCUMENTATION"

> (TR 108) ALJ: "Well, you know today, I had a problem, too, until I saw the two documents you brought. I had trouble finding out JUST what the issues were."

I also brought to him a copy of a deposit slip, dated April 1, 1974 marked "Social Security refund on ins. premium" $255.00; and a copy of a check dated May 30, 1974 - in the amount of $1.00 - made payable to County Clerk, Kendall County - with the notation: Copy of marriage license, Meyer S. Levenson, Frances."

I WAS COMPLYING WITH MR. WHITT'S REQUEST FOR OUR MARITAL STATUS, EVEN AFTER I HAD RECEIVED BURIAL PAYMENT. I HAD NEVER HAD TO FURNISH THAT TYPE OF INFORMATION TO ANYONE ELSE - EVER!

II.

MY DISCOVERY OF NEW EVIDENCE: THE ALJ'S ERROR IN HIS DECISION (among many others)

In Appellant's Petition for Rehearing En Banc, mailed Air Express on September 28, 1983, read:

"Heretofore, I have only been concerned about the errors made in the clerk's handwriting on my application of February 20, 1974 - plus many others people."

ALJ'S "DECISION":

"Accordingly, it is the decision of the undersigned Administrative Law Judge that based on her application for lump-sum death benefit, filed February 20, 1974, the claimant is not entitled to a processing of an application for widow's benefits effective concurrently with the filing of such application for lump-sum death benefit."

Date: January 30, 1981 s/s Frank J. Buldain
ALJ

YET, THE "APPLICATION FOR LUMP-SUM DEATH PAYMENT" READS:

"I hereby apply for the lump-sum death payment and for any insurance benefits payable to me under Title II of the Social Security Act, as amended." (Note: The emphasized clause has NOT BEEN OBLITERATED. TR. 139)

THUS: IT IS "CONCURRENTLY"

"Regulations 404.328 (20 CFR 404.328) provide in pertinent part that the widow of an individual who died fully insured IS entitled to widow's insurance benefits IF she has filed application for widow's insurance benefits."

I QUOTED THE FOREGOING ERROR TO THE 5TH CCA. IT W A S IGNORED.

THIS I DEEPLY RESENT!

IS EACH APPLICANT A LICENSED ATTORNEY?

I DO NOT LIKE BEING BELITTLED, JUST BECAUSE I AM PRO SE!

"Lawyers on opposite sides of a case are like the two parts of shears; they cut what comes between them, but not each other." Daniel Webster.

"We have need of very little learning to have a good mind." Michel de Montaigne.

AND DID you read Justice Warren Burger's unusually strong-worded address to the recent Bar Association in Las Vegas that the legal system "is too costly, too painful, too destructive, too inefficient for a truly civilized people, and he held lawyers and judges to blame." This is just ONE EXCERPT. There were MORE! USA TODAY. 2/13/84. I have heretofore read several more opinions that he has made at various times in other editions...along the same lines.

WEBSTER defines "Insurance" (in substance): "an amount paid upon a LOSS - life, fire, etc. for a premium payment. We both paid SS premiums.

"If I fly by plane to or from Houston, TX, and am killed in the plane, or to or from the airport in a commercial vehicle, American Express would pay my beneficiary $500,000.00.

COST OF PREMIUM: $5.50 ROUND TRIP" quoted to WDT

and 5TH CCA.

"LUMP SUM"

I consulted the Head Librarian of the Literary Department, and she more than verified, that in the English language, this is NOT a hyphenated word:

1. Oxford English Unabridged Dictionary, which is recognized as the most scholarly and complete authority on English language defines "Lump sum": a sum which covers or includes a number of items.

2. Webster's Third Unabridged Dictionary defines "lump sum": a gross, or total sum paid at one time.

3. Funk and Wagnalls New Standard Dictionary of the English Language defines "lump sum": a gross sum covering several items.

I WENT TO THE LOCAL SS OFFICE WITH A SINGULAR PURPOSE:

1. To OBTAIN my husband's lump sum insurance.
2. Metropolitan paid me death benefits in ONE "LUMP SUM".
3. Credit Life Insurance paid me death benefits in "ONE LUMP SUM" to pay the balance of the note due on my husband's car.

WHY SHOULD I NOT EXPECT A LUMP SUM PAYMENT FROM THE SSA??? The HEADING on the Application reads thusly.

I am a licensed Real Estate Broker since June 3, 1943. Each person with whom I dealt in my SS case,

was well aware of my profession. Would a reasonable mind not conclude that by 1974, I would certainly be capable of filling in a simple form - particularly where it concerns my adult life? I am a longtime member of the San Antonio Board of Realtors. There are 50 forms that members must use (applicable to various transactions). 14 were promulgated by the Texas Real Estate Commission. The only other forms that we are permitted to use is one that has been prepared by a licensed attorney. I sent 7 samples to WDT. These were IGNORED - as were all of my Exhibits.

So, my CREDIBILITY AND CAPABILITIES should not have been CHALLENGED IN A DEMEANING MANNER. From the moment that I started my first negotiations with the local SS office to the ALJ, the WDT and the 5TH CCA, I have been truthful. I am not a liar, thief nor cheat.

> In my opinion, it is quite appropriate to quote Albert Schweitzer: "Truth has no special time of its own. Its hour is now....always".

This has always been by modus operandi. It was ingrained by my parents' teachings, and reinforced

by our Code of Ethics in the real estate profession

(ALJ to 5TH CCA)

TR. 72 - ALJ's Decision: "Nevertheless, Mrs. Levenson, in all honesty, testified..."

TR. 75 -ALJ's Decision: "The foregoing comments are made in defense of Mrs. Levenson, because the undersigned believes that she was honest and truthful in her testimony as she best comprehended the facts."

"THE FACTS" - that is ironical: There was an

ALMOST TOTAL ABSENCE AND OMISSION OF THE FACTS AS PRESENTED TO ME BY MR. WHITT AND MRS. YOWS.

I can understand SIMPLE ENGLISH, AND SIMPLE DIRECTIONS; THEY WERE DERELICT IN THE PERFORMANCE-OF THEIR OBLIGATIONS - AS WERE THE OTHERS.

TR. 94: (FL): "...in this Manual which is entitled "Retirement and Survivor's Benefits on Page 6..."because helping you with your Social Security is our business..."

I HAD ABSOLUTELY NO EXPLANATION UNTIL I RECEIVED MY FIRST PAYMENT ON MY OWN CLAIM IN 1979. Mr. Levenson had paid premiums since 1935. I had paid premiums. I FULLY EXPECTED A LUMP SUM ON EACH CLAIM. I questioned - THEN AND ONLY THEN - DID I LEARN THAT SSA PAYMENTS WERE MADE ON A MONTHLY

BASIS - BASED ON THE HIGHEST WAGE EARNER.

NEITHER MR. WHITT NOR MRS. YOWS DIFFERENTIATED OR EXPLAINED. (I just NOW wonder what becomes of funds paid in by the other wage earner).

> September 8, 1980 at the replaying of the tape of the First Hearing, Mrs. Rose Montlauro, Hearing Assistant, in her handwriting: "The Claims Representative is supposed to tell you which of your benefits are higher!"

This was submited in an Exhibit marked 4 EE (Extra Emphasis) in My Motion for Summary Judgment to the WDT. NO comments were MADE by the Defendant. The RECORDS were AVAILABLE TO BOTH THE WDT AND 5TH CCA.

EVEN THE PAYMENT CENTER DID N O T KNOW - and I as a LAYPERSON WOULD?

FIRST: MINE WERE HIGHER.
NEXT: MY HUSBAND'S BENEFITS WERE HIGHER.
NEXT: THEY OVERPAID ME. (No comments from exhibit sent to the 5TH CCA.)
NEXT: THEY REFUND ME $809.70 when I referred them to a letter that I had written them. (A copy that I sent 5TH CCA)
NOW: ON FEBRUARY 29, 1984: THEY HAD U N D E R P A I D ME BY $198.30, AND MADE A REFUND.

NOW, W H A T WOULD A REASONABLE MIND CONCLUDE? WELL, ABSOLUTELY NO ACCEPTANCE OF MY C R E D I - B I L I T Y FROM THE ALJ TO THE 5TH CCA.

AND THIS IS J U S T I C E ??

"Where CREDIBILITY is crucial to the outcome, the District Court cannot constitutionally exercise its discretion to hold a hearing on contested issues of fact." Due Process clause of the FIFTH AMENDMENT AND ARTICLE III of the U.S. Constitution. Vol 447 U.S.C. - Part 3. Preliminary Print - Official reports of Supreme Court. 530 - U.S. V Raddatz p. 67"

I need to know WHY if the Defendant said that I was "intelligent" enough to write xx number of pages in "Rebuttal" (page by page-paragraph by paragraph, there were approximately 28 pages) to ALJ's Decision - WAS HE NOT "INTELLIGENT ENOUGH TO READ THEM? I HAD EVERY RIGHT TO EXPECT "SPECIFICITY" from all, including the ALJ.

I need to know WHY when I pointed out 24 errors - point by point - to the WDT, and 25 errors to the 5TH CCA that Mr. Whitt made on my Application for "LUMP SUM" Benefits, HAS EVERYONE FROM THE SS, THE ALJ TO THE 5TH CCA LATCHED ONTO JUST

ONE POINT: "I AM NOT FILING FOR WIDOW'S BENEFITS AS I AM STILL WORKING" - WHEN I HAVE CONSTANTLY MAINTAINED THAT THAT STATEMENT WAS ERRONEOUS. IT WAS TAKEN OUT OF CONTEXT OF OUR CONVERSATION CONCERNING MY OWN RETIREMENT. And, it should certainly be ESTABLISHED THAT I HAD NO WAY OF KNOWING "WHOSE" BENEFITS WERE HIGHER!

ARE THEIR ERRORS FORGIVABLE

JUST BECAUSE THEY WORKED FOR THE GOVERNMENT?

WHY IS MY CREDIBILITY IMPUGNED?

WHY IS MY ABILITY AND EXPERIENCE IN DRAWING UP CONTRACTS SINCE 1943 BEING IGNORED?

WOULD A REASONABLE MIND BELIEVE THAT I WOULD ANSWER #9 "LAST MARRIAGE" "1935"?

Would a reasonable mind (especially a legally trained mind) not conclude from reading and studying the application in question:

1. That, in my case, since questions 22 through 28 referring to "burial" were slashed through would mean:

   THAT, IN EFFECT, I WAS ONLY APPLYING FOR"...: AND FOR ANY INSURANCE PAYABLE TO ME..."

   AND THAT WAS EXACTLY WHAT I WAS DOING, plus the small burial insurance...IN A

LUMP SUM LIKE METROPOLITAN AND CREDIT LIFE. IT FURTHER SUBSTANTIATES MY JUSTIFIABLE CLAIM FOR RETROACTIVE BENEFITS.

That section definitely needed to be filled in since we were "not living in the same household at the time of death."

I NEED TO KNOW WHY my brother-in-law's notarized statement that my husband resided with them in between divorces WAS IGNORED?

2. Question 22 - (a) section - in parenthesis baffles me: "(hereafter referred to as "burial expenses").

   WHY IS THAT NOT IN BOLD PRINT IN THE CAPTION ON THE APPLICATION?

   WHY IS IT OBSCURELY PLACED, IF THAT IS THE SOLE INTENT OF "LUMP-SUM"?

3. Question #4 also baffles me: WOULD THE PREPARER "BE ABLE TO WORK "AT THE TIME OF DEATH"? In my humble opinion: "prior to entering the hospital." There are other diseases besides sudden heart attacks or strokes.

4. BOTH Questions #10 and #21 give instructions concerning "marriages" to use the space RESERVED for "Remarks".

   WHY WAS THE "REMARKS" SECTION NOT MARKED: "FORTHCOMING" - INSTEAD OF A MISTRUTH?

   I COMPLIED IMPLICITLY WITH HIS REQUEST TO OBTAIN COPIES OF OUR MARRIAGES AND DIVORCES. (foregoing explanation and Mrs. Tealer IN TR. 126.) She was not altogether truthful in her testimony: I commented to her when the file finally came from Kansas City - and I saw our FIRST marriage certificate -

part of it was in Hebrew. I had forgotten; but she was truthful in her last statement: if tax information and marriage certificates were sent to the office, it would mean that it was for the processing of BENEFITS! TRS. 156 & 157 confirm this - even into 1975, I was submitting tax information.

In my opinion, both Mr. Whitt and Mrs. Yows were "trainees" compared to the Counselor Mary Rockwood had (I did not even know about "earning limitations until I received my FIRST PAYMENT).

THIS WAS THE FIRST TIME I HAD PRESENTED THIS EVIDENCE. IT WAS AN EXHIBIT TO THE 5TH CCA IN MY BRIEF.

An excerpt: "She obtained both my husband's record and mine, even though we both expected that mine would be much higher, since my husband had been so badly disabled for well over ten years.

My husband's earnings were less, but the representative advised me to apply for a claim based upon his earnings. She figured out that I would lose approximately $900 in the three years until I reached the age of 65. Since my earnings were higher, she said that in the long run, it would be to my benefit to switch from his, and then apply for my own benefits several months before I became 65. I am following her advice."

Mary Rockwood

notarized, 22nd day of October, 1982

I did not even KNOW that BOTH FILES SHOULD BE REQUESTED. This letter was mislaid in my haste to get a Petition to the WDT on time.

NOW, CAN A REASONABLE MIND MAKE CONCLUSIONS IN COMPARISON WITH MY EXPERIENCE?

IT IS IMPERATIVE TO ASK:

WHY WAS I NOT GIVEN AN OPTION?

"The substantial evidence test does not mean that the finding of the administrative agency must be blindly accepted, but mandates critical and searching examination of record and setting aside of Secretary's decision when necessary to ensure results consistent with the Congressional intent and elemental FAIRNESS. BROWN v Califano, 451 F Supp 688 (D.C.L.A. 1978.)

AND, NOW WE COME TO "ALLEGED" CLAIM FOR DISABILITY

I WANT TO KNOW WHY THE LETTER FROM A REPUTABLE DOCTOR DISCLAIMING MY DISABILITY WAS IGNORED? ONE WHO HAS HAD MY MEDICAL HISTORY SINCE AUGUST 31, 1964? (Exhibit Plaintiff's Objections to Magistrate's Findings).

I WANT TO KNOW WHY THERE WAS NO COPY OF A LETTER FROM THE PAYMENT CENTER REJECTING OR ACCEPTING A CLAIM FOR DISABILITY? Had there been a claim, I would CERTAINLY have furnished it to the ALJ along with the other information THAT WAS NOT TENDERED TO HIM BEFORE THE HEARING BY THE LOCAL SS OFFICE ...which helped enlighten him. WDT and 5TH CCA and TRANSCRIPT. (The Secretary took out of context a subject discussed at Hearing, and clerk's misunderstanding.)

I WANT TO KNOW WHY MY CREDIBILITY WAS IGNORED WHEN I SAID THAT I HAD NEVER BEEN DISABLED WITHIN THE TIMEFRAME REQUIRED BY THE SS. WHY

SUBSTANTIAL EVIDENCE IN THE CONTRACT FORMS AND LETTER THAT I FURNISHED AS EXHIBITS TO THE WDT WERE I G N O R E D ?? THAT I WAS "GAINFULLY EMPLOYED"..even though I was ill for a period in June, 1979. I worked from the hospital.

WHY MRS. TEALER'S LETTER - MADE PART OF THE EXHIBIT - WAS IGNORED, EXPLAINING THAT THERE HAD TO BE PROOF THAT A MEDICAL OPINION STATING THAT CLAIMANT WOULD BE DISABLED FOR TWELVE MONTHS BEFORE SS WOULD CONSIDER SUCH CLAIM.

WHY DID THE DEFENDANT NOT CAREFULLY RESEARCH THE DISABILITY RULINGS?? "That the initial burden is on the claimant and then SHIFTS TO THE SSA?

There was NO SUCH ALLEGATION OF DISABILITY ON TR 147.

> YET, THE 5TH CCA IN THEIR JUDGMENT UNEQUIVOCALLY ACCEPTED A STATEMENT MADE BY AN INEFFICIENT CLERK. MY O N L Y INTENT FOR ANY APPLICATION FROM AUGUST, 1979 TO THIS VERY DATE WAS FOR "RETROACTIVE BENEFITS."

It is my private opinion that the counsel for Petitions for the Secretary, as well as the ALJ, needed to "SHIFT THEIR BRAINS INTO GEAR" when they constantly referred to me as "DEAD", when they alluded to Question 8 - stating that "Plaintiff" was a Real Estate Broker for the last two years." Submitted to WDT and 5TH CCA.

AND HIS ERRORS WERE SO CAREFULLY OVERLOOKED!

II. MORE CREDIBILITY

An excerpt from Memorandum in Support of Plaintiff's Motion for Summary Judgement - Page 1- April 14, 1982:

"The following will further substantiate my contentions that decisions rendered were arbitrary, prejudicial and highly tinged with UNDESERVED bias. Facts, evidence and information that I furnished were either ignored, taken OUT-OF-CONTEXT, distorted or regarded with capricious disbelief with no allowance for my credibility. Character references (TR.47) and Exhibit 12 in my First Pleading were not furnished as cosmetic embellishments. I EARNED them.

THIS IS MY GOVERNMENT, TOO - BUT NOT RIGHT OR WRONG

The Court has erred in Denying My Motion for an Oral Hearing.

Mathews v. Weber - 96 S.Ct. 549 (1976):

"-----The Supreme Court, Mr. Chief Justice Burger, held that the Federal Magistrates Act of 1968 permitted the district court to refer all social security benefit cases to United States magistrates for preliminary review of the administrative record, ORAL argument, and preparation of a recommended decision as to whether the record contained substantial evidence to support the administrative determination, which determinations were all subject to independent decisions on the record by the district judge, who could, in his discretion, hear the matter de novo; and such reference did not constitute the magistrate a special master and conflict with the requirement of the Federal Rules of Civil Procedure that reference to a master be the exception and not the rule."

"Due process of law has not been served."

DEFINITION OF HEARING:

OXFORD ENGLISH DICTIONARY: listening to evidence

and pleadings in a Court of Law.

WEBSTER: An opportunity to speak; chance to be heard; audience; an investigation or trial before a judge.

"Where credibility is crucial to the outcome, the district court cannot constitutionally exercise its discretion to refuse to hold a hearing on contested issues of fact." Due Process Clause of the 5th Amendment and Article III of the U.S. Constitution. Vol. 447, U.S. Part 3 - Preliminary Print Official Reports of Supreme Court 530 U.S. v. RADDATZ - p. 667.

"The substantial evidence test does not mean that the findings of the administrative MUST BE BLINDLY ACCEPTED, BUT MANDATES CRITICAL AND SEARCHING EXAMINATION OF RECORD, AND SETTING ASIDE OF Secretary's decision when necessary to ensure results CONSISTENT with the CONGRESSIONAL INTENT AND ELEMENTAL FAIRNESS. Brown v. Califano, 451 F Supp 6088 (DC. L.A. 1978)"

From Librarian - DEFINITION OF REHEARING:

OXFORD ENGLISH DICTIONARY: "A second or subsequent hearing, especially of a cause or or appeal."

BLACK'S LAW DICTIONARY: "Second consideration of cause for purpose of calling to Court's or Administrative Board's attention any error, omission or oversight in first consideration. A retrial of issues and presumes notice to parties entitled thereto and opportunity for them TO BE HEARD."

It is IRONICAL that my PETITION FOR AN ORAL HEARING WAS DENIED BY THE WDT; and my Petition for REHEARING EN BANC had to be entitled "REHEARING"

when I HAD NEVER HAD A HEARING...and the 5TH CCA REFUSED to CONSIDER MY NEW EVIDENCE. Would the word "REHEARING" be a misnomer - obscure - or legal "jargonese"?

This is an excerpt from an article written in the San Antonio Light in February, 1982:

> **POLICIES**
>
> Have you ever had trouble understanding an insurance policy?
>
> It is reported that during an argument before the New Jersey Supreme Court the following colloquy took place in a "comprehensive homeowner's insurance policy" case:
>
> **Chief Justice Weintraub: I don't know what it means. They say one thing in big type, and in small type they take it away.**
>
> **Justice Haneman: I can't understand half of my insurance policies.**
>
> **Justice Francis: I get the impression that insurance companies keep the language of their policies deliberately obscure.**

This is what William Saffire, the lexicographer, would define as legal "jargonese"

The following is an excerpt of Appellant's Petition for a Rehearing En Banc:

> "I am sorry, but in my opinion, this Court has erred in the decision rendered in my case; it has been based upon the ancient maxim: "The King can do no wrong" - and that each Decision Maker was exalted to the position of "King." Thus, in effect, I became a "second rate citizen" - which is totally unacceptable to me. It is my firm belief that the Ten Commandments - along with the Golden Rule would take precedence. They form the very foundation of our Constitution".

Also, it is my opinion that the SSA has erred in

the preparation of a contradictory form for an applicant to sign - because it does not represent what it says (in "black and white") in a parallel manner in which it conducts its business:

ARE WIDOW'S BENEFITS PAID IN "ONE LUMP SUM"?

This form is vague and misleading to the average layperson. Even the legally trained minds have failed to note the clause that I underlined on Page 1. The kept hammering the words "intended to make"; AND THAT WAS EXACTLY WHAT I DID. In my case the application did not even pertain to "BURIAL BENEFITS." It was in contradiction by wrongfully marking out foregoing information that I had previously furnished in this application." (Page 4 of foregoing Petition En Banc.)

I specifically went to the office of the SSA to receive LUMP SUM INSURANCE and the small burial insurance. Mr. Whitt obtained the necessary information, but it was five years later that I found out that he did not record it CORRECTLY when I instigated my claim for RETROACTIVE BENEFITS in August, 1979. It was he who explained to me that I WOULD RECEIVE HIGHER BENEFITS IF I TOOK MY RETIREMENT AT AGE 65, which was exactly what I did - March 1, 1979. I told him "that I was still working, thank God, and I would wait." But, he DID NOT EXPLAIN TO ME ABOUT THE "DIFFERENCE OF ACCOUNTS". Mr. Levenson had been paying premiums

since 1935. I had no reason to not believe that I WAS NOT GOING TO RECEIVE LUMP SUMS ON BOTH ACCOUNTS, because I had also paid insurance premiums. He had me follow the same procedure as if I WOULD RECEIVE A LUMP SUM. I learned "about the procedures" the hard way when I started doing research when I filed suit with the WDT. Mr. Whitt, in this instance, actually was following Manual Rules when he had me secure copies of my marriages and divorces, and took my accountant's name to obtain information relative to income to receive Benefits. This is established in the Transcript (aforementioned). In 1975, I was still furnishing the local SS office with income reports. This is also made part of the record and submitted to the WDT and 5TH CCA.

THE ALJ'S ASSUMPTIONS IN HIS DECISION (TR. 72) WERE OUT OF ORDER. Metropolitan did not want the above information. I furnished a letter (part of Exhibits) wherein they stated was all that they needed was the death certificate and for to me to fill in a form which also included our marital

status. We were married. Probate Court did not require the aforementioned requirements. There was a letter from Mr. Emmanuel Gassman, the attorney who handled my husband's estate, as part of the Exhibits.

I was NEVER asked to read anything that I signed in the SS office. I enunciate my words very clearly. I made the wrong assumption about their scope of intelligence in handling my case.

I mistakenly judged that each person with whom I dealt with at the SS office was experienced, had good hearing and understanding of the English language. Had I had reason to suspect otherwise, I would have excused myself - gone into a corner and quietly read the instrument, or asked to take it home to study...to telephone if I did not understand. If I was not satisfied with their explanation, I would have gone to the manager, or consulted an attorney.

Chief Justice Weintraub: "They say one thing in big type, and in small type they take it away." Never, ever in any face to face consultation or by

telephone conversations, did any person ever warn me about the APPLICATION FOR LUMP-SUM DEATH PAYMENT:

"Notice (in small print): Whoever makes or causes to be made any false statement or representation of a material fact in an application or for use in determining a right to payment under the Social Security Act is subject to not more than a $1,000 fine or 1 year of imprisonment, or both." (Rehearing en Banc - pages 4 and 5) NEW DISCOVERY.

WOULD A REASONABLE MIND CONCLUDE
THAT I WOULD PLACE MYSELF IN SUCH JEOPARDY?

I think that not warning an applicant before that person affixes a signature is ONE OF THE LOWEST FORMS OF CONDUCTING BUSINESS THAT I CAN CONCEIVE...OR ASSUMING THAT A PERSON UNDERSTANDS THE COMPLEXITIES INVOLVED. THIS APPLIES TO ANY CONTRACT. As I have explained before: this to me was "routine".

OPINION OF THE 5TH CCA - PAGE 1, SEPT. 2, 1983:

"Plaintiff was awarded widow's benefit June 1979."

By neither incompetent representative WAS I INFORMED:

1. Of "options" at age 60.
2. What Earnings Limitations entailed - that under SSA Regulations, earnings of interest or income from an inherited 7-unit apartment were not considered as "Earnings."

This I learned when I received my first payment in June, 1979...5 years LATER. I fully expected a Lump Sum. (aforementioned.)

Page 2 - paragraph 2: THIS IS ABSOLUTELY LUDICROUS.

1. There was no MEDICAL proof to SUBSTANTIATE

DEFENDANT'S ALLEGATIONS THAT I MADE A CLAIM FOR DISABILITY. (only the statement of an inept clerk, and I HAD NO COPY.) My SINGULAR PURPOSE: "RETROACTIVE BENEFITS".

It is ironical: December 26, 1982 I fell in an unlighted stairwell, broke my hip, leg, and fractured my shoulder and sustained great pain since then, and now faced with the traumatic thought of additional surgery to remove the pins. November 8, 1983, I underwent a life-threatening operation for a second abdominal repair. For the rest of my life, I am to not pick up, pull, or push anything over the pressure of 5 pounds. I casually asked the manager at the SS office while we were recently discussing another subject, about receiving disability benefits, and he said: "NO." HOW was ANYONE to KNOW that I would not be able to perform as I had prior to the time of my accident? Not everyone wears the "same size shoes."

2. Page 2, PP 3. When I instituted my claim in August, 1979, relative to the aforementioned article, ALL the Supervisor had to do was PICK UP THE WATTS LINE AND ORDER B O T H OF OUR FILES! (This is what Mrs. Washington did on February 29, 1984 to verify an unclear notice of underpayment from the Payment Center. Within two hours she called me.) The laxness of Mrs. Pealer, in my opinion, was INEXCUSABLE TO HAVE ME SO AGITATED FROM AUGUST 1979 UNTIL SEPTEMBER 4, 1980.... and, then the show still continues.

Please read my Motion for Summary Motion, wherein the Hearing assistant TWICE said at the replaying of each tape of the Hearings: "She couldn't understand why the ALJ dealt SO HARSHLY with me." The gist also related to the 5TH CCA.

AS WELL AS ALL OF THE MISCONDUCTS OF THE ALJ, STATED IN ALL OF MY PETITIONS.

Please read where my attorney at the second Hearing said that in all the years he had appeared before the Bench, that he had never received such RUDE TREATMENT.

The ALJ was SO ANGRY, that he twice addressed Mr. Guajardo as "Mr. Levenson". (In Transcript and WDT)

And please read where the ALJ, AFTER the 1st Hearing said: "I'm glad that you did not have an attorney. It saved you lots of money." (LOOK AT MY LOSS OF EARNINGS AS A REAL ESTATE BROKER!) This subject was in conjunction with the forthcoming elections, which he described in his Decision as a "non-stressful" subject to me. Little did he know that the phonetic "ticks" in politics puts me "on a soapbox."

(TR 86)
ALJ: "She feels that her widow's benefits should be paid retroactively to..."

Claimant: "at the same time that I filed for them."

ALJ: (inaudible)(I replayed the tape for the whole transcript which was THREE TIMES CERTIFIED AS ACCURATE, and I sent a copy of the CORRECTED TRANSCRIPT TO THE WDT, but, this THEY OVERLOOKED, CONVENIENTLY). The so-called "inaudible" part was: "lump-sum death payment".

Claimant: "Yes, sir, at the time that I filed for them February of '74."

(TR 90) A. "I WAS AUTOMATICALLY ENTITLED TO MY WIDOW'S BENEFITS."

(TR91) Q. ".....and you had $6,000 the year before."

He just would not take that I had to report my 1973 income on my 1974 Tax Income Report, and that was BACK SALARY due me from my Father's estate that was on the verge of bankruptcy, because unknowingly, he had leukemia. He would just not understand that I was able to close the estate in August of 1973, and thereafter went back into the real estate business full time, and WAS NOT ON A SALARY.

"BEFORE 1978, even if an individual had yearly earnings over the exempt amount, he would still be entitled to benefits for those months in which he received no earning---" Practice Social Security Manual - Page 19 Sweeney, Lyko and Martin.

I was under the mistaken impression that the Court of Appeals was the "LAST WORD" - until I read that aforementioned article in 1979.

After my husband's death, I was my sole support, and was involved in the "rat race" of earning a living in the real estate business. Some agents did not even know the meaning of the Code of Ethics, and quite a few of them crossed my path.

A L L DECISION MAKERS ERRED

I NEED TO KNOW WHY THEY HAD THE RECORDS AVAILABLE TO THEM, AND DID NOT READ THEM COMPLETLY, AND OVERLOOKED THEIR OBLIGATIONS? WHY THEY MADE P A R T I S A N JUDGEMENTS?

"It is an established doctrine in courts of equity that things shall be considered done

which ought to have been done". Joseph Story - U.S. Supreme Court Justice.

"LUMP-SUM DEATH BENEFIT: "...though an application is not necessary if the widow/widower was entitled to wife's/husband's benefits preceding the spouse's death." Practice Manual for SS Claims - p. 42, By Sweeney, Lyko and Martin.

"However, such face-to-face interviews are not required in Title II Claims. SSA Claims Manual S 9212.1". Practice Manual for Social Security Claims. Page 64.

TR. 160 WILL FURTHER CORROBORATE THAT I DID NOT GO TO THE LOCAL SS OFFICE TO OBTAIN WHAT IS ERRONEOUSLY ENTITLED "LUMP-SUM". I WENT FOR A "LUMP SUM", PRIMARILY.

As the magistrate's findings, dated August 10, 1982 clearly admit, "There obviously is a sharp conflict in the evidence as to whether plaintiff applied for widow's benefits on February 20, 1974, or at any time prior to December 3, 1979."

From the 5TH CCA Circuit Judges, dated September 2, 1983: Page 4, last PP: "Although there is a conflict in the evidence as to whether plaintiff intended to apply for widow's benfits via her February 20, 1974 application or at any time prior to December 3, 1979, this factual issue was resolved against plaintiff by the ALJ, whose decision was approved by the Appeals Council on June 5, 1981. The role of this Court is not to reweigh the evidence but merely to determine whether the administrative decision is supported by substantial evidence."

THIS IS NOT WHAT IT SAYS IN THE DUE PROCESS CLAUSE OF THE 5TH AMENDMENT, AND ARTICLE III OF U.S. CONSTITUTION. (AFOREMENTIONED)

THE MATHEWS V. WEBER (AFOREMENTIONED) HAS BEEN SHEPARDIZED TWICE, AND HAS NOT BEEN REVERSED.

NOR

THE FIRST AMENDMENT:...OR ABRIDGING THE FREEDOM OF SPEECH.

PAGE 5-OBJECTION TO MAGISTRATES FINDINGS:

Section 404.621(b)(1)(ii) and (iv), although pertaining to filing for lump-sum benefits, recognizes an implied duty on the part of the Administration to obtain CORRECT information, and a failure of communication between the representative may be grounds for REVISING an earlier DECISION..

This Court has the authority pursuant to 42 U.S.C. s405(g) to enter a judgment reversing the decision of the Secretary, with or without remanding the cause for a rehearing. Upon reversal, this Court should have rendered a decision granting me retroactive survivor benefits from May 13, 1974 through June, 1979, or reverse and remand for a rehearing to establish whether I was in fact entitled on my 60th birthday to survivor benefits, and whether I was entitled under the Act at the time of my application to survivor benefits, in addition to lump sum benefits, and

whether I was entitled under the Act at the time of my application to survivor benefits in addition to lump sum benefits, and finally whether I was clearly prejudiced or specifically harmed by the Administration's representative in his failure to disclose my entitlement to survivor benefits and/or requirements for entitlement on February 24, 1974, or a short time thereafter. The following recent Court decisions favor such a reversal:

A. Even though the record presented to the Court may contain substantial evidence to support the Secretary's decision, the Court may still exercise its power to remand for the taking of additional evidence. Good cause to remand exists where the administrative law judge failed to diligently explore all relevant facts involved in the case. Walker v. Harris, 642 F2d 714 (4th Cir. 1981).

B. There exists a presumption of judicial reviewability of federal agency action. American Nursing Centers, Inc. v. Weinberger, 387 F. Supp. 1116 (D.C. Ill. 1975).

C. Substantial evidence means more than a scintilla, and such relevant evidence as reasonable minds might accept as adequate to support the conclusion. Carter v. Harris, 615 F.2d 1044 (5th Cir. 1980).

D. To determine whether the decision of the Secretary is based upon substantial evidence, the district court may not look

solely to evidence, but must also take into account whatever in record fairly detracts from its weight. Patterson v. Califano, 475 F.Supp. 578 (E.D. Va. 1979).

E. The substantial evidence test does not mean that the findings of the administrative agency must be blindly accepted, but mandates critical and searching examination of record and setting aside of Secretary's decision when necessary to ensure results consistent with the Congressional intent and elemental fairness. Brown v. Califano, 451 F.Supp. 688 (D.C. L.A. 1978).

F. In conducting review under 42 U.S.C. s405 (g), the district court is required to examine facts contained in the administrative record, evaluate conflicts, and make determinations which make up ultimate administrative decision. Wedlow v. Weinberger, 399 F.Supp. 1215 (D.C. Okla. 1975).

G. The Secretary's decision is not based on substantial evidence, where a hearing on a plaintiff's claims for benefits is dominated by the Administrative law judge whose prejudgment determinations seem manifest in procedures and interrogation and where such overriding facts tend to process and dissolve and dilute quality and quantity of evidence as presented. Given v. Weinberger, 380 F.Supp. 106 (D.C. W.Va. 1974).

The following was quoted to the 5TH CCA on Petition for Rehearing, page 7:

"WITH REFERENCE TO
THE ALJ

I am sorry that I might have sounded caustic in

My Rebuttal to his decision - pointing out his errors. But, it was a very difficult for me to retain respect for the bench. Please see my letter to Judge Garcia - following Page 13 - in Plaintiff's Motion for Summary Judgement.

> "The Secretary's decision is not based on substantial evidence, where a hearing on a plaintiff's claim for benefits is dominated by the Administrative law judge whose pre-judgment determination seems manifest in procedures and interrogation and where such overriding facts tend to process and dissolve and dilute quality and quantity of evidence as presented. Given v. Weinberger, 380 F. Supp. 160 (D.C. Wa. Va. 1974.)

a. TR.112; A. - "BECAUSE YOU'RE GOING TO RULE AGAINST ME, AREN'T YOU?"
Q. "I THINK YOU UNDERSTAND THAT."

THIS STATEMENT WAS MADE B E F O R E THE SECOND HEARING

b. TR.105: A. "In other words, just a moment please, now I'm getting nervous."----

REMEMBER, PLEASE, THE EYES AND LIPS

ARE THE MOST IMPORTANT TOOLS

IN MY TRADE

HIS ATTITUDE CHANGED COMPLETELY. HIS EYES NARROWED. HIS LIPS WERE COMPRESSED WHEN I STARTED POINTING OUT ERRORS MADE IN THE LOCAL OFFICE. (TR. 113)

(TR. 105) Excerpt from ALJ's Decision: "---An easy way to hold hearings is to smile in a kindly judicial manner, ask the right nonprovocative questions, and write a decision in bland general terms so that the claimant never knows of the tentative reservations which the Administrative Law Judge may have had."

I WAS HARASSED AND INTIMIDATED BY HIS M A N N E R

Mr. Guajardo, my friend and attorney said that NEVER in all of his appearance BEFORE THE COURT HAD HE EVER RECEIVED SUCH TREATMENT.

He forgot to present all of his questions, he was so upset.

THE ALJ'S ACTIONS CONTRADICT HIS RHETORIC

The TWO following statements were excerpts of a memorandum written to Mr. Guajardo (Exhibit #15 in Plaintiff's Motion for Summary Judgement.) They were made by Mrs. Rose Montlauro each time that I went to get tapes of the Hearings:

1. "She personally felt he dealt "too harshly" with me."

2. "Mrs. Montelauro again repeated above when I went in to get a copy of the Second Hearing.

In my opinion, the Decisions and Allegations were fraternally biased, unfair, unreasonable, discriminatory and very PARTISAN.

I prayerfully hope that this Honorable Court will rule in my favor; grant me RETROACTIVE BENEFITS FROM FEBRUARY 1974, costs, loss of time from sustaining a livelihood, and interest. I am sorry that I could not have been more brief, but, as it is, I have really only touched on the proverbial "tip of the iceberg" - because I am so afraid that I MIGHT AGAIN BE IGNORED by virtue of my being Pro Se

If the facts set herein need verification or clarification, and if this Honorable Court would wish me to appear personally, I will be pleased to do so.

WHEREFORE, I pray that this Honorable Court grant this most gracious Writ of Certiorari.

Respectfully submitted,

Frances Levenson,

FRANCES LEVENSON, PRO SE
Petitioner
P. O. Box 12405
San Antonio, Texas 78212
(512) 732-4951

"He who judges
must review
both sides"

Author Unknown

APPENDIX

APPENDIX A

Department of
HEALTH, EDUCATION, AND WELFARE
Social Security Administration
Office of Hearings and Appeals

Name and Address of Claimant:

Frances Levenson
P. O. Box 12405
San Antonio, Texas 78212

NOTICE OF DECISION-DENIAL
PLEASE READ CAREFULLY

. . . . .

FINDINGS

Based on the preponderance of the evidence the undersigned finds, as follows:

1. Mrs. Levenson filed application on February 20, 1974 for lump-sum benefits, based on the death of her husband, Meyer S. Johnson, who died on December 15, 1983, and who was fully insured for Social Security benefits purposes at the time of his death.

2. She was paid the lump-sum death benefit in April, 1974.

3. She advised the Administration at the time she filed such application that she had been married to Meyer S. Levenson from 1935 to December 15, 1973, and that she was not filing for widow's benefits because she was still working.

4. She did not complain of any inaction on the part of the Administration in processing an application for widow's benefits between the time she filed application for lump-sum benefits on February 20, 1984 until sometime late in 1979 or early 1980, the exact date not being ascertainable from the record.

5. Because of her representation at the time she filed application for lump-sum benefits that she had been married to Meyer S. Levenson from 1935 to December 15, 1973, there was no

reason for the Administration to inquire or process an application for divorced widow's benefits in February, 1974.

DECISION

Accordingly, it is the decision of the undersigned Administrative Law Judge that based on her application for lump-sum death benefit, filed February, 20, 1984, the claimant is not entitled to a processing of an application for widow's benefits effective concurrently with the filing of such application for lump-sum death benefit.

Frank J. Buldain
Administrative Law Judge
Office of Hearings & Appeals
1015 Jackson Keller Road,
Room 222
San Antonio, Texas 78213

DATE: January 30, 1981

APPENDIX B

IN THE CASE OF:

FRANCES LEVENSON, Claimant
MEYER LEVENSON, Wage Earner

CLAIM FOR:

Divorced Widow's Benefits
S.S.N. 467-09-6884

CLAIMANT'S WRITTEN ARGUMENT

That pursuant to the request of the Court, the Claimant herein presents this written argument and would respectfully show unto the Court the following:

That on December 17, 1980, I appeared before the Administrative Law Judge for a hearing in the above matter in behalf of Mrs. Levenson. I did this in behalf of Mrs. Levenson at no charge to her and for the purpose of assisting her in receiving funds as the widow of her husband, Meyer Levenson. That I have been acquainted with Mrs. Levenson

for approximately twenty (20) years and have known Mrs. Levenson to be a truthful and righteous person and for this reason I offered to assist her with her claim. It came as a great surprise and astonishment to me the manner and method that the Judge sitting in this hearing, Frank J. Buldain, conducted this hearing. During the course of the hearing, as will be reflected on the recording made of the hearing; his hostility and impatience was obvious, that he acted arbitrarily and interrupted the proceedings on num erous occasions to make declaratory remarks immaterial to the matter before the Court. That it was obvious from his demur that he had reached a decision upon his own findings and investigation outside the presence of the Claimant,

before the hearing started. That the witness, Mrs. Tealer was allowed to listen to the previous hearing of Mrs. Levenson and further prepared for the testimony that she gave at the hearing before the Court on the 17th day of December, 1980. That I, as Mrs. Levenson's attorney at the time was not aware of this and I feel that this conduct on the part of Judge Buldain was prejudicial as well as unfair and underhanded. That in fact, the Judge participated in the defense of the claim, and did not sit as a judge but conducted said hearing as an overly defensive government defense counsel. That Judge Buldain is incapable of setting as a fair and impartial judge.

Mrs. Levenson should be given the benefit of a doubt and considered equitably in that she at no time intended to waive any benefits she was

entitled to receive at any time and this presumption should be considered throughout the hearing. Secondly, that the evidence shows that Mrs. Levenson pursued her claim as the widow of Meyer Levenson even after receiving the death benefits, she continued to present verification of her claim; that this will indicate that she was pursuing something other than death benefits when she continued to present exhibits establishing her marriage and claim for benefits as the widow of Meyer Levenson. That the application made the basis of the rejection is in conflict with her intent at the time of filing. That said application is not in her handwriting with the exception of her signature. That the presumption should be that she was claiming the benefits that would more adequately compensate her and having

failed to claim these benefits more beneficial to her which leaves ANYONE to believe that she either did not understand how to make such a claim or that such claim was not explained to her. I feel that the government should be equitable and fair in making a determination in this case and further consideration of her health and condition, at that time, shows that she was in deep depression. That the government should not penalize her for her state of mind nor her lack of knowledge of how to make a claim and that in fact, the government had the responsibility to insure that she fill the proper and necessary papers to receive the highest benefits that she was justly entitled to, and that the failure in doing this should be charged to the government. Mrs. Levenson should not be penalized

for not having the benefits explained to her and the application wrongfully filed.

That in view of the attitudes and bias of the Judge in question, Judge Frank J. Buldain should disqualify himself from this claim; that another Judge should be appointed to hear this matter and that Mrs. Levenson be given a new fair and equitable hearing.

Respectfully submitted,

J. Anthony Guajardo
Attorney at Law
1032 Milam Bldg.
San Antonio, Texas 78205

Attorney for Claimant

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FRANCES LEVENSON	)	
	)	
V.	)	
	)	
RICHARD S. SCHWEIKER, JR.	)	SA-81-CA-411
Secretary of Health and Human Services	)	

O R D E R

On this day came on for consideration by the Court Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment, filed in the above-styled and numbered cause. Also under consideration by the Court are the Findings and Recommendations of the United States Magistrate Robert B. O'Connor, as well as the objections thereto, if any, and after having conducted an independent review of the record in this cause, and having made a de novo determination with respect to

those portions of the Magistrate's Findings and Recommendations to which objections have been made, the Court hereby accepts and approves the Magistate's Findings and Recommendations.

It is accordingly ORDERED that Plaintiff's Motion for Summary Judgment be, and the same is hereby DENIED.

It is further ORDERED that Defendant's Motion for Summary Judgment be, and the same is hereby GRANTED.

SIGNED and ENTERED this 12th day of Nov., 1982.

H. F. GARCIA
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1033
Summary Calendar

FRANCES LEVENSON,

Plaintiff, Appellant,

versus

MARGARET M. HECKLER, Secretary
of Health & Human Services,

Defendant-Appellee.

Appeal From the United States District Court
For the Western District of Texas

(September 2, 1983)

Before GEE, POLITZ, and JOHNSON, Circuit Judges.

PER CURIAM:

Plaintiff appeals from a summary judgment for the Secretary of Health & Human Services in an action under the Social Security Act, 42 U.S.C. § 405(g), to review a decision of the Appeals Council

of the Social Security Administration, which became the final decision of the Secretary, denying plaintiff widow's benefits retroactive to February 1974.[1] We affirm.

The administrative proceedings are set forth in the Findings and Recommendations of the magistrate of August 10, 1982:

Plaintiff challenges the award of widow's benefits effective in June 1979, alleging that she should be entitled to these benefits as of February 1974. She claims that when she filed the application for lump-sum benefits in February 1974, she also intended to file for widow's benefits by the same application.

If the Secretary's decision that plaintiff was not entitled to widow's benefits prior to June 1979 is supported by substantial evidence, this Court

---

1. Plaintiff was awarded widow's benefits commencing in June 1979.

Plaintiff filed an application for lump-sum death benefit on February 20, 1974, as a result of the death of her husband on December 15, 1973.

Plaintiff received the lump-sum death benefit. On March 1, 1979, plaintiff applied for, and is now receiving, her retirement insurance benefit. Plaintiff filed an application for widow's benefits on December 3, 1979, which alleged she became disabled in June, 1979. Plaintiff was deemed to be entitled to widow's benefits as of June, 1979, but was not paid those benefits because she was receiving benefits in a higher amount on her own social security record. On June 7, 1980, plaintiff was notified of her entitlement to surviving divorced wife's benefits as of June, 1979.

Plaintiff requested reconsideration of the denial of widow's benefits retroactive to 1974 and her retroactive claim was denied on reconsideration.

Dissatisfied with those determinations, plaintiff requested that her claim for retroactive widow's benefits be considered de novo by an administrative law judge of the Social Security Administration. Plaintiff's request was granted, and on September 4, 1980, a full hearing was conducted, at which plaintiff appeared. Due to plaintiff's accusations of errors made in processing her claim, a second hearing was held on December 17, 1980, at which time plaintiff and her attorney appeared, together with a witness from the Social Security Administration. The administrative law judge issued a recommended decision on January 30, 1981, denying plaintiff's claim for widow's insurance benefits retroactively to February, 1974.

Plaintiff thereafter sought review of the recommended decision before the Appeals Council. After considering all the evidence of record, the administrative law judge's reasoning and evaluation, the applicable law and regulations, and plaintiff's arguments in support of her claim, the Appeals Council approved the denial of widow's insurance benefits retroactively to February, 1974, on June 5, 1981.

must affirm the administrative decision. This Court may not reweigh the evidence, resolve material conflicts in the testimony, try the issues de novo, or substitute its judgment for that of the Secretary. Allen v. Schweiker, 642 F.2d 799 (5th Cir. 1981). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 91 S.Ct. 1420, 1427 (1971).

There is substantial evidence in the record to support the Secretary's decision denying plaintiff widow's benefits retroactive to February 1974. The Secretary found that plaintiff did not in fact apply for widow's benefits on February 20, 1974,[2] because her application for lump-sum death benefits, signed by plaintiff, contained the following statement: "I am not filing for widow's benefits

---

2. 42 U.S.C. § 402(e)(1)(C) provides, in pertinent part, that the widow must have "filed application for widow's insurance benefits...." The Secretary found that plaintiff did not apply for these benefits until December 3, 1979.

at this time as I am still working." Further, the Secretary found that plaintiff did not complain of any inaction on the part of the administration in processing an alleged application for widow's benefits until sometime in late 1979 or early 1980. In this regard, the Secretary noted plaintiff's signed statement on March 15, 1979, in connection with her application for Retirement Insurance Benefits, which reads as follows: "I am not applying for widow's benefits on my husband Meyer as my own benefit is much more."

Plaintiff contends that the Social Security claims representatives who filled out the forms erroneously included the above statements in her applications. She argues in her brief on appeal that she signed the 1974 application in a routine manner, assuming that the claims representative was knowledgeable and competent. At the September 1980 hearing before the administrative law judge (ALJ), plaintiff excused her signature on the two statements by stating that "I didn't read it carefully

and understand it fully. There was my error."

Although there is a conflict in the evidence as to whether plaintiff intended to apply for widow's benefits via her February 20, 1974 application or at any time prior to December 3, 1979, this factual issue was resolved against plantiff by the ALJ, whose decision was approved by the Appeals Council on June 5, 1981. The role of this Court on review is not to reweigh the evidence but merely to determine whether the administrative decision is supported by substantial evidence. The record in this case clearly contains substantial evidence to support the Secretary's decision that plaintiff was not entitled to widow's benefits retroactive to February 1974 because she failed to comply with the statutory requirement that she file an application for these benefits until 1979.

AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 83-1033
Summary Calendar

D. C. Docket No. SA-81-CA-411

FRANCES LEVENSON,

Plaintiff-Appellant,

versus

MARGARET M. HECKLER,
Secretary of Health and
Human Services,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before GEE, POLITZ and JOHNSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 34;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

September 2, 1983

ISSUED AS MANDATE: NOV-3 1983

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-CI-1033

FRANCES LEVENSON,

Plaintiff-Appellant,

versus

MARGARET M. HECKLER,
Secretary of Health and
Human Services,

Defendant-Appell.

Appeal from the United States District Court for the Western District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 9-2-83, 5 Cir., 198 , ____ F2d__)
(October 24, 1983)

Before GEE, POLITZ and JOHNSON, Circuit Judges.

PER CURIAM.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

REHG-8

United States Circuit Judge

END OF DOCKET